

Let's make sure it's 'Build, Build, Build' and not 'Argue, Argue, Argue (Bust)!'



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AT THE end of June, the Prime Minister announced what he described as radical reform and a series of policies to promote a rapid increase in construction activity within the UK, encapsulated under the title 'Build, Build, Build'.

Whatever one may think of the policies, if they are effective then the construction industry can hope for increased confidence in the medium term. However I am seeing along with clients an all too predictable problem which could seriously undermine efforts to create that rosier future for the construction industry: it is the potential breaking of the supply chain by the highly pressured contract re-negotiations which CV-19 and the lockdown has kicked-off. And it is a problem which is particularly acute due to the contractual and legislative frameworks upon which the industry has long operated.

As those in the industry know, the vast majority of larger projects and many smaller ones are governed by standard form contracts which set out quite prescriptive frameworks regulating all key issues, including how delays are to be dealt with. Although terminology differs, this tends to involve an application by the (sub)contractor to the contract administrator for an extension of time and perhaps compensation.

What follows is often a negotiation to reconfigure the commercial terms to some extent, potentially a more formal dispute to be resolved in an adjudication or even court litigation. This framework in my view is quite sensible and has served the industry relatively well over the years. However, during the unique circumstances of a pandemic and lockdown, what this framework means is that there is a wholesale renegotiation going on between employers, contractors and sub-contractors about delay, suspension, payment, loss and expense, liquidated damages among other things.

Not in living memory will we have seen the entire industry all at the same time enter into, to a greater or lesser extent, a wholesale renegotiation of the principal terms of contracts already agreed. Even worse, all this within the context of severe financial peril which incentivises parties to fight for every penny.

With any luck, in the most part, these negotiations will end up with something both parties can live with, albeit inevitably eating into margins. But there is severe risk that many of these negotiations will descend into more formal contractual disputes as one party pushes the other past negotiating breaking point. What will ensue is a multitude of contractual adjudication processes, incurring

costs on all sides, and thereafter potentially a wave of litigations which burn resource on all fronts.

Inevitably that will cause existential risk to businesses with the shallowest pockets. In turn, a wave of insolvencies would then have a reaction all the way through the chain as businesses are unable to withstand the increase in bad debts.

The word of warning in this article is a straight-forward one. While it may be attractive to drive a hard bargain in the renegotiations, be careful how hard it is pushed as the supply chain may not be able to withstand the pressure at this particularly difficult time. This is perhaps a somewhat counter-intuitive message for a disputes lawyer who regularly represents construction businesses in those disputes, but overall I think it preferable to have an industry remaining intact and functioning rather than a raft of construction insolvencies.

Businesses in the construction sector will need to find the right balance. Robust negotiation is fine, but we should stop short of all-out litigation armageddon if possible.

Let's see if we can ride out the perfect storm and achieve a 'Build, Build, Build' future rather than an 'Argue, Argue, Argue (Bust)' one.

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